

Louisiana Law Review

Volume 72 | Number 4
Summer 2012

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Repository Citation

Brittany Layne Stringer, *Cyberbullying: Louisiana's Solution to Confronting the Latest Strain of Juvenile Aggression*, 72 La. L. Rev. (2012)
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Cyberbullying: Louisiana's Solution to Confronting the Latest Strain of Juvenile Aggression

I. INTRODUCTION

*October 7, 2003 will always be the day that divides my life. Before that day my son Ryan was alive. A sweet, gentle and lanky thirteen year old fumbling his way through early adolescence and trying to establish his place in the often confusing and difficult social world of middle school. After that day my son would be gone forever, a death by suicide. Some would call it bullycide or even cyber bullycide. I just call it a huge hole in my heart that will never heal.*¹

John Halligan penned these words of pain in the years following the death of his son, Ryan Halligan, who committed suicide in 2003.² Although Halligan did not blame one single person or one single event for his son's suicide, he had no doubt that both physical and electronic forms of bullying were significant factors that triggered his son's depression and eventually led to his son's untimely death.³ The electronic bullying that Ryan experienced has become so predominant that the Centers for Disease Control and Prevention (CDC) has attempted to define it. The CDC defines electronic aggression as any type of harassment or bullying that occurs through e-mails, instant messaging, chat rooms, websites, or text messaging.⁴ Electronic aggression—often called “cyberbullying”—includes teasing, ridiculing, insulting, defaming, offending, and threatening.⁵ Because of the limited research on cyberbullying, it is difficult to make definitive statements about the possible impact of cyberbullying on today's adolescents. However, the CDC found that, in 2005, nine percent of adolescent Internet users claimed that they had been harassed or bullied online.⁶ Researchers note that this is a 50% increase from

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1. John Halligan, *If We Only Knew, If He Only Told Us*, RYAN'S STORY, <http://www.ryanpatrickhalligan.org> (last visited May 6, 2012).

2. *Id.*

3. *Id.*

4. MARCI F. HERTZ & CORINNE DAVID-FERDON, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS 3 (2008), available at <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf>.

5. *Id.* at 3.

6. *Id.* at 5.

the 6% reported adolescent victims in 2000.⁷ Many researchers are concerned that the percentage of bullied victims will continue to increase at a substantial rate.⁸ The Federal Probation Juvenile Department reported in 2007 that 90% of middle school students have had their feelings hurt online and around 75% have visited websites that “bashed” another student.⁹ Other federal governmental research indicates that not only does cyberbullying have the potential to lead to school violence, but it can also cultivate future adult criminal behavior.¹⁰

Although state legislatures differ in their definition of “bullying,” this definition is representative: “written or verbal expressions, or physical acts or gestures, that are intended to cause distress to another student while on school grounds or at school activities.”¹¹ With the constantly growing popularity of the Internet and the ever-expanding use of technology, bullying in cyberspace is an increasing problem for young Americans.¹² Because cyberbullying consists of a public forum that allows for wide distribution and access, cyberbullying can be more detrimental for the victim than traditional forms of bullying.¹³ Although both traditional bullying and cyberbullying victims report feeling depressed, the victim of cyberbullying is more likely to report higher degrees of depression, and the cyberbully is more likely to emerge unscathed.¹⁴ Because cyberbullying normally takes place away from campus and school activities, student victims of cyberbullying are left with little or no assurance of recourse.

7. *Id.*

8. *Id.*

9. Alvin W. Cohn, *Juvenile Focus*, 71 FED. PROBATION 44, 50 (2007).

10. Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 656–57 (2009) (finding that a “2002 United States Secret Service report concluded that bullying was a major factor in school shootings such as Columbine” and that “[a]nother report found that nearly sixty percent of boys who were bullies in middle school were convicted of at least one crime by age twenty-four”).

11. This representative definition was derived by the author from Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 8–11 (2005).

12. Turbert, *supra* note 10, at 657 (finding that “[t]his new form of bullying is more troublesome and widespread than it seems and is an epidemic in many of America’s school systems”).

13. Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1219 (2003).

14. See generally W.N. Welsh, *The Effects of School Climate on School Disorder*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 88, 88–107 (2000); Turbert, *supra* note 10.

As the number of cyberbullying incidents continues to grow and as more adolescents continue to increase their use of technology, parents, school districts, legislatures, and society in general must determine how to handle this growing epidemic. States are addressing the growing frequency of cyberbullying through various legislative enactments.¹⁵ These control mechanisms include allowing victims to pursue cyberbullying claims in civil court, enacting statutes that criminalize cyberbullying, and expanding the school district's jurisdiction over students' off-campus Internet speech. As of July 2010, all three remedies were available to Louisiana residents.¹⁶ However, the effectiveness of available legal remedies is questionable. Thus, just like the hole in John Halligan's heart, there is a void in current Louisiana legislation. As technology continues to become more accessible, affordable, and sophisticated, Louisiana educational policy makers must act now to examine all the options and determine the best systematic approach to the issue.

This Comment examines the concept, background, and legal issues of cyberbullying, as well as Louisiana's current legal position on the subject. Part II analyzes traditional forms of bullying and their impact on adolescents, explains the elements and characteristics of cyberbullying, and distinguishes between the two types of bullying. This Part ultimately concludes that, although the action and motive of the bully are essentially the same in each type, a technology-based medium aggravates the impact of bullying. Part III explains the current cyberbullying-related legislation in Louisiana by analyzing the civil suit remedy, examining the possibility of criminal prosecution, and exploring the option of expanding school districts' jurisdiction over students'

15. Turbert, *supra* note 10, at 658; *see also* Anne Collier, Schools, *State Laws & Cyberbullying*, CONNECTSAFELY.ORG, Sept. 17, 2007, <http://www.Connectsafely.org/NetFamilyNews/schools-state-laws-a-cyberbullying.html> ("Rhode Island is considering one of the toughest anti-cyberbullying laws Under the proposed legislation, students and their parents could be prosecuted if the student is caught sending Internet or text messages that prove disruptive to school, whether or not they send those messages from school South Carolina recently passed a law that mandates school districts to define bullying, including cyberbullying In Oregon, lawmakers have backed a bill that would require all schools to adopt policies that ban cyberbullying and allow for expulsion of those who are caught doing it Virginia is out in front as the first state to require public schools to teach Internet safety.") (internal quotations omitted); U.S. DEP'T OF HEALTH AND HUMAN SERVICES, STATE LAWS RELATED TO BULLYING AMONG CHILDREN AND YOUTH, *available at* http://www.education.com/reference/article/Ref_State_Laws_Related/?page=2.

16. *See* LA REV. STAT. § 17:416.13 (2011); LA REV. STAT. § 14:40.7 (2011).

off-campus Internet communication. Next, it recommends that the Louisiana Legislature refocus its perspective on the school's traditional role as a mediating institution between the school, students, parents, and the community. This Part then investigates whether a school district has the legal authority to control such a student activity as cyberbullying by analyzing the school's geographical and constitutional limitations. Finally, it argues that, because of the school's traditional role as a mediating institution, the school should have proper authority to control students' off-campus Internet communication through comprehensive, concise, and preventative state anti-bullying legislation. Part IV concludes that implementation of such a policy is essential to protect and defend adolescents from the damaging impact of cyberbullying.

II. STICKS AND STONES IN THE TWENTY-FIRST CENTURY

*We feel strongly that Ryan's middle school was a toxic environment, like so many other middle schools across the country for so many young people. For too long, we have let kids and adults bully others as a rite of passage into adulthood inside a school building.*¹⁷

"Sticks and stones may break my bones, but words will never hurt me." Although the first phrase of the old adage speaks the truth, the last phrase, especially as applied to bullying, is questionable. Words can hurt, especially for adolescents attempting to understand the world and assimilate into their social environment.¹⁸ To understand the problem presented by cyberbullying, it is essential to first understand various forms of bullying and the fundamental differences between traditional bullying and cyberbullying.

A. The Traditional Bully

Bullying is a community issue that must be addressed through societal involvement, which includes students, parents, schools, the legislature, and even the media.¹⁹ One commentator states that "a person is . . . bullied or victimized when he or she is exposed,

17. Halligan, *supra* note 1.

18. Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 545 (2009) (finding that "[s]ocial exclusion is an attack on the soul of the child, causing emotional scars that are hard to heal, and [that] can last a lifetime").

19. *Id.*

repeatedly, and over time, to negative actions on the part of one or more persons.”²⁰ Educational researchers define bullying as “a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child.”²¹ Educational research clearly indicates that bullying is not only present in almost every American school but also is one of the most difficult problems for school officials to control.²²

Bullying tends to consist of three main characteristics: “1) Repetitive negative actions targeted at a *specific victim*, 2) Direct confrontation caused by a perpetrated *imbalance of power*, and 3) Effective manipulation of emotional responses such as *fear* [and] *inadequacy*.”²³ The repetitive nature of bullying leads to a cycle of both physical and psychological harassment and abuse for the victim.²⁴ As a result, victims experience depression, hopelessness, shattered self-esteem, and social dejection, and in some cases, commit suicide.²⁵ Although society once considered bullying, harassment, teasing, and even hazing as part of the growing-up process, events like the Columbine High School shooting caused U.S. society to take more seriously the threats of violence, harassment, and bullying among adolescents.²⁶ Because the essential goal of bullying is to *de-humanize another person*, one must question the validity of this purported coming-of-age process.²⁷

B. The Cyberbully

Cyberbullying occurs “when a child, preteen, or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen, or teen using the

20. Darby Dickerson, *Essay: Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 52 (2005) (internal quotations omitted).

21. Christensen, *supra* note 18, at 546 (internal quotations omitted).

22. *Id.* (finding that over 5.7 million youth in the United States are estimated to be involved in some type of bullying, either as a bully, a target, or both).

23. Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 646 (2004) (emphasis added).

24. *Id.* at 646–47.

25. Colleen Barnett, *Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC L. REV. 579, 583 (2009); see also Turbert, *supra* note 10, at 657–58.

26. See *In re Douglas D.*, 626 N.W.2d 725, 749–50 (Wis. 2001) (Prosser, J., dissenting) (“This case comes to the court against a disturbing backdrop of school violence. Over the past eight years, American education has endured an unprecedented outbreak of shooting incidents and other violence at schools across the United States.”).

27. See Christensen, *supra* note 18, at 548.

Internet, interactive and digital technologies or mobile phones.”²⁸ Although this definition provides a general understanding of cyberbullying, this Comment focuses on one particular type of cyberbullying. Therefore, it is imperative to first define the elements of this particular kind of cyberbullying and the actors involved.

For purposes of this Comment, cyberbullying comprises four main elements.²⁹ First, the action of the bully is deliberate and not accidental. Although the bully does not have to intend harm, his actions are intentional. Second, the bully’s actions are repetitive. Third, the victim experiences harm. Fourth, the bully transmits his actions through a technology-based medium. Thus in general, the act of cyberbullying is willful and repeated harm inflicted through the use of a technology-based medium.³⁰

Next, for the purposes of this Comment, several qualifications of the basic definition are necessary. Cyberbullying is not cyberstalking, which Louisiana recognizes as a criminal offense perpetrated by one adult upon another.³¹ Additionally, cyberbullying is not the use of the Internet and various technologies by an adult to solicit and sexually exploit an adolescent. Thus, cyberbullying does not consist of actions between a minor (under the age of 17) and an adult. This Comment limits cyberbullying to acts by a minor (under the age of 17) perpetrated toward another minor (under the age of 17). Although cyberbullying can and does impact universities, cyberbullying is limited in this Comment to the pre-college level, primarily secondary education settings within the state’s public school system. Lastly, this Comment limits the geographical component of cyberbullying to off-campus actions and their effect on the school environment.³² Thus, the bully’s actions are not on school grounds or at a school activity.

C. Traditional Bullying v. Cyberbullying: Same Harm With a New Medium?

At the most basic level, the actions of bullying and cyberbullying are the same.³³ However, it is the medium through

28. Barnett, *supra* note 25, at 580.

29. *Id.*

30. *Id.*

31. See LA REV. STAT. § 14:40.3 (2010) (defining the crime of cyberstalking).

32. See *infra* Part III.C for further explanation of the geographical component of cyberbullying in regard to the school district’s authority to control such student behavior.

33. Turbert, *supra* note 10, at 653–54.

which cyberbullying occurs that increases its impact.³⁴ Research indicates that cyberbullying can actually have a more detrimental impact on the victim than traditional bullying for numerous reasons. Technology offers several tools that permit the bully “to be both less obvious to adults and more publicly humiliating, as gossip, critical remarks, and embarrassing pictures are circulated among a wide audience of peers with a few clicks.”³⁵ Technology enables the cyberbully to inflict pain on his victim without being physically present or witnessing the results.³⁶ Unlike traditional bullying, cyberbullying does not include face-to-face interaction.³⁷ The electronic medium of cyberbullying permits the bully not only to inflict emotional pain without seeing the effects but also to do so anonymously through sending or posting messages without a name, using a false name, or even by assuming another’s identity.³⁸ As many as 46% of adolescents who were victims of cyberbullying did not know the identity of their bully.³⁹ In traditional bullying, the victim knows the bully and can report the bully to proper authorities. The victim of cyberbullying, however, is often alone in dealing with the threatening and aggressive e-mails and messages. Although the victim can turn off the computer or not read the messages, public blogs and websites often leave the victim with no defense mechanism.⁴⁰ As Ronald Iannotti, a scientist at the Eunice Kennedy Shriver National Institute of Child Health and Human Health, explained, “With Facebook, YouTube, and everything else, the victim may not even be sure who else has seen or heard the bullying, and because it is not face-to-face, [he or she] can’t retaliate as easily.”⁴¹ As a result, the medium of cyberbullying permits the bully to inflict pain on his victims while hiding his true identity and dissociating himself from the impact of his actions.⁴²

34. *Id.* (noting that psychologists have found that “the distance between the bully and victim . . . is leading to an unprecedented—and often unintentional—degree of brutality, especially when combined with a typical adolescent’s lack of impulse control and underdeveloped empathy skills”).

35. Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES, Aug. 25, 2004, at A1.

36. *Id.*

37. *Id.*

38. Barnett, *supra* note 25.

39. Hertz, *supra* note 4, at 7.

40. *Id.*

41. Stephanie Smith, *Cyber bully victims ‘isolated, dehumanized’*, CNN HEALTH, Sept. 21, 2010, available at <http://thechart.blogs.cnn.com/2010/09/21/cyber-bully-victims-isolated-dehumanized/>.

42. *Id.*

Through technology, the bully can reach more people in a seemingly effortless manner.⁴³ It appears that technology permits bullies to be more malicious and uncaring, to have more allies, and to reach an inestimable audience.⁴⁴ Due to the medium, the bully's fear of reprimand is greatly decreased.⁴⁵ Ultimately, the medium enables the bully to feel untouchable and invincible.⁴⁶

Sameer Hinduja and Justin Patchin, directors of the Cyberbullying Research Center, have explored numerous empirical studies as well as some high-profile anecdotal cases that clearly demonstrate a link between suicidal ideation and experiences with bullying.⁴⁷ One of their most current studies examines the extent to which nontraditional forms of peer aggression, such as cyberbullying, are related to suicidal ideation among adolescents.⁴⁸ Including a sample of approximately 2,000 middle school students, the research indicated that youth who experienced traditional bullying or cyberbullying had more suicidal thoughts and were more likely to attempt suicide than those who had not experienced such forms of peer aggression.⁴⁹ Although traditional bullying and cyberbullying have detrimental effects on both actors involved, the technology-based medium of cyberbullying enhances its impact on the victim. As a result, control of the cyberbullying issue is an immediate societal concern.

III. FILLING IN THE LEGISLATIVE HOLES

*We place accountability for this tragedy, first and foremost, on ourselves as his parents . . . but also on Ryan's school administration, staff and the young people involved. As parents, we failed to hold the school accountable to maintain an emotionally safe environment for our son while he was alive. But accountability and responsibility should be allocated and shared by all involved—parents, bullies, bystanders, teachers, school administrators . . . basically the whole system.*⁵⁰

43. Dickerson, *supra* note 20, at 56.

44. *Id.*

45. *Id.*

46. *Id.*

47. Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCHIVES OF SUICIDE RES. 206, 206 (2010).

48. *Id.*

49. *Id.*

50. Halligan, *supra* note 1.

Louisiana residents currently have little, if any, assurance that victims of cyberbullying have an avenue for recourse. Although the civil suit remedy, the criminal prosecution possibility, and the option of expanding school districts' jurisdiction over students' off-campus Internet communication are available options, the impracticality, illegality, and lack of enforcement potential leave Louisiana residents uncertain about how to handle this growing epidemic.

A. The Civil Remedy

Some individuals argue that off-campus cyberbullying is best addressed through a civil remedy.⁵¹ Defamation and its subsets such as libel or slander are the traditional causes of action available for cruel, harassing, or insulting speech.⁵² Although this legal remedy provides a vehicle of redress for victims, its overall effectiveness is debatable.

One potential civil remedy available to bullied students is an action for the tort of defamation. In Louisiana, defamation involves the invasion of a person's interest in his or her reputation and good name.⁵³ Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.⁵⁴ As a result, a plaintiff must prove that the defendant acted with actual malice or other fault and published a false statement with defamatory words that caused the plaintiff damages.⁵⁵ However, even when a plaintiff presents a *prima facie*

51. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. SCI. & TECH. L. 243, 245 (2001).

52. See, e.g., Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 277 (2008) ("If traditional and generally applicable off-campus civil law remedies such as libel are available for teachers and principals who feel defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, in-school punishment against those students?").

53. *Cyprien v. Bd. of Supervisors ex rel. Univ. of Louisiana Sys.*, 5 So. 3d 862, 866 (La. 2009).

54. *Id.*; see also Erb, *supra* note 52 (finding that to establish a *prima facie* case for defamation in most states, the following elements must be proved: (1) defamatory language on the part of the defendant; (2) defamatory language that is "of or concerning" the plaintiff; (3) publication of the defamatory language by the defendant to a third person; and (4) damage to the reputation of the plaintiff).

55. *Cyprien*, 5 So. 3d at 866.

case of defamation, recovery may be precluded if the defendant can show that the words were true or protected by either an absolute or qualified privilege.⁵⁶ Although the cyberbully victim can attempt to establish a *prima facie* case, legal limitations and pragmatic considerations render this option unlikely to succeed.

Students are unlikely to prevail on a defamation theory because even their adult counterparts have a difficult time succeeding. Two cases, *J.S. ex rel. H.S. v. Bethlehem Area School District*⁵⁷ and *Moyer v. Amador Valley Joint Union High School District*⁵⁸ illustrate the difficulties faced by schoolteachers seeking relief under a civil remedy. In *J.S.*, a student created a website from his home computer that had derogatory comments and drawings about his mathematics teacher.⁵⁹ In particular, the student solicited money via the website for a hitman to kill the teacher and made several comparisons between the teacher and Hitler.⁶⁰ The derogatory comments and drawings caused the teacher to take a medical leave of absence. Subsequently, the teacher brought several civil claims against the student.⁶¹ Although the court did find the parents liable under a negligent supervision claim, the judge stated, "I had serious doubts in my mind as to whether the Web sites were defamatory They were a lot of things: They were distasteful, they were rude, they were crude, they were obscene."⁶² Still, the court found the statements were not defamatory. Thus, this court's decision clearly demonstrates the inadequacy of the civil remedy for injury by a student's off-campus Internet communication. The inadequacy of the civil remedy is further demonstrated in *Moyer* where the court reasoned that, because there were no verifiable facts or "no factual assertion capable of being proved truth or false," the teacher's defamation claim against the student was not actionable.⁶³

While the civil remedy offers teachers and school administrators little legal protection from off-campus defamation, for even greater reasons, the civil remedy offers student victims of cyberbullying even less protection. First, students do not have professional reputations to protect.⁶⁴ As a result, the courts cannot

56. *Id.* at 867.

57. 807 A.2d 847 (Pa. 2002).

58. 275 Cal. Rptr. 494 (Cal. Ct. App. 1990).

59. 807 A.2d, 850–51.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Erb, *supra* note 52, at 278–79 ("Just as teachers are afforded little protection from harassing speech through defamation claims, students are

consider whether the speech is damaging to their employment and professional status.⁶⁵ Considering that many defamation actions succeed as a result of professional reputation damage, this factor, or the lack of this factor, in the student victim analysis renders the civil remedy even less effective.⁶⁶ Second, the best defense for a bully in response to a cruel or insulting speech claim is that the statement was true.⁶⁷ Thus, several critics of the civil remedy for students' off-campus Internet speech claims warn that a defense team may set out to prove that a young victim is indeed "gay" or "the biggest slut in school."⁶⁸ Third, there is a difference between adult and adolescent language.⁶⁹ Hence, the court may encounter difficulties in interpreting the nature of the adolescent-based slang or slur. Additionally, language that may be insulting and emotionally damaging for a child may not have the same impact on an adult.⁷⁰ Because our civil system is generally targeted towards adults, many civil statutes and court interpretations of those statutes may yield situations in which a child or adolescent is simply left outside the scope of protection.⁷¹

Lastly, from a pragmatic perspective, society is unlikely to prefer handling these types of claims in civil court. Two practical problems arise when placing such claims in civil court. First, depending on a student victim's success in court, the civil option leads to either inaction or overreaction. By placing the issue within the civil realm, the adversarial atmosphere separates and destroys the school-student-parent-community dynamic that could help

afforded even less protection because they do not have professional reputations in the community that can be slandered.").

65. *Id.*

66. *Id.*

67. *Id.*; see generally *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–92 (1975) (stating that under the common law, truth was not a complete defense to prosecution for criminal libel, although it was in civil actions).

68. Amy Benfer, *Cyber Slammed*, SALON.COM, http://archive.salon.com/mwt/feature/2001/07/03/cyber_bullies/index.html?source=search&aim=mwt/feature (last visited Oct. 28, 2010).

69. *Id.* Cindy Cohn of the Electronic Frontier Foundation demonstrated how this can become an issue for the courts: "So and so is the biggest ho? What does that mean? The law doesn't deal well with parsing student slang." *Id.*

70. Erb, *supra* note 52, at 279 (providing a good example of the difference between the effect on an adult female and a 13-year-old girl of a male calling each of them a "slut" on a web site—the 13-year-old girl will be much more dramatically affected than her adult counterpart; but since the civil statutes were designed to deal with conflicts between adults, the statutes do not take into account the differences of impact and effect for adolescents).

71. *Id.*

yield a positive, all-encompassing resolution to the problem.⁷² Therefore, from a systematic perspective, this option is a reactive, as opposed to a proactive, approach. Second, the civil remedy separates the adolescent from the problem since it is the parent who actually brings the action on behalf of the child.⁷³ Thus, this penalty-oriented option is unlikely to yield a true resolution to the problem. Because of legal limitations and pragmatic issues, the civil court system fails to provide the most adequate forum to address a minor's off-campus Internet speech targeted towards another minor.

B. The Criminal Prosecution Possibility

Another potential remedy to the cyberbullying problem is to let the criminal justice system address it. As a result, numerous states have passed statutes that criminalize the act of cyberbullying. The Louisiana Legislature recently addressed the issue of cyberbullying through the enactment of Louisiana Revised Statutes section 14:40.7, which "creates the crime of cyberbullying."⁷⁴ The statute defines cyberbullying as "the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen."⁷⁵ The statute provides that "whoever commits the crime of cyberbullying shall be fined not more than five hundred dollars, imprisoned for not more than six months, or both."⁷⁶ In addition, the statute provides an exception to these penalties for offenders under the age of 17.⁷⁷ If the offender is

72. See generally Susan P. Limber, *Addressing Bullying in Schools: An Introduction to the Olweus Bullying Prevention Program*, available at <http://www.clemson.edu/olweus> (finding that the main components to any successful preventative bullying program must involve individuals, parents, the school, the classroom, and the community).

73. LA. CIV. CODE art. 235 (stating of "[p]arental protection and representation of children in litigation" that "[f]athers and mothers owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit, in which they may be interested . . .").

74. LA. REV. STAT. § 14:40.7 (Supp. 2012).

75. LA. REV. STAT. § 14:40.7(A) (Supp. 2012).

76. LA. REV. STAT. § 14:40.7(D) (Supp. 2012).

77. LA. REV. STAT. § 14:40.7 (D)(1)–(2) (Supp. 2012). The statute states: Except as provided in Paragraph (2) of this Subsection, whoever commits the crime of cyberbullying shall be fined not more than five hundred dollars, imprisoned for not more than six months, or both. (2) When the offender is under the age of seventeen, the disposition of the matter shall be governed exclusively by the provisions of Title VII of the Children's Code.

under the age of 17, Title VII of the Children's Code exclusively governs the situation.⁷⁸ Therefore, Title VII of the Children's Code will govern the criminal activity of the minor.

Many contend that student conduct may warrant punishment by both law enforcement officials and school authorities, but school discipline should generally remain the prerogative of the schools and not the juvenile justice system.⁷⁹ Although many courts have followed similar guidelines, scholars continue to criticize grants of such authority to the school districts and advocate that the criminal justice system is the proper forum for control. However, this argument is problematic from both a systematic and pragmatic perspective.⁸⁰ First, the school authorities and the school community are the parties who witness and are directly impacted by the bullying.⁸¹ Thus, law enforcement and the criminal justice community are largely disassociated from both the bullying and its impact.⁸² This disassociation from the problem leads to a disadvantage and lack of understanding, compared to the perspective of the school authority.⁸³ Second, although state prosecutors do not encounter some of the jurisdictional issues faced by school authorities, states still face both threshold and implementation issues in regard to their criminal cyberbullying and cyberbullying-related legislation.⁸⁴

An incident at Horace Greeley High School in Chappaqua, New York illustrates a typical problem faced by a state attempting to punish cyberbullying through the criminal courts.⁸⁵ This incident arose when two male students created a website and posted the sexual histories, names, addresses, phone numbers, and other personal information of over 40 of their female classmates.⁸⁶ Initially, the students were suspended for five days without a

78. See LA. CHILD. CODE art. 730 ("Allegations that a family is in need of services must assert one or more of the following grounds: . . . (11) A child found to have engaged in cyberbullying.").

79. See Erb, *supra* note 52 (stating that "because the school system is much more involved with parents and children in the community than is the criminal justice system, it is practical to allow schools to use their discretion when dealing with off-campus Internet speech that affects those on campus").

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. For a comparison, see generally Shonah Jefferson & Richard Shafritz, *A Survey of Cyberstalking Legislation*, 32 UWLA L. REV. 323 (2001) (demonstrating that many times charges are never brought under the Internet-related legislation).

85. Erb, *supra* note 52, at 275.

86. Benfer, *supra* note 67.

school hearing.⁸⁷ The school principal then contacted the New Castle Police Department.⁸⁸ Subsequently, the Westchester District Attorney, Jeanne Piro, charged the two males with second-degree harassment, which carried a sentence of up to one year in jail or a \$1,000 fine.⁸⁹ However, within weeks, Piro announced that the Department was not pursuing the charges.⁹⁰ He said the material on the site was “offensive and abhorrent,” but it did not meet the legal definition of harassment.⁹¹ The Westchester community reacted to the dropped charges with outrage and distaste.

Although the new cyberbullying legislation does not force Louisiana courts to apply a harassment statute within the cyberbullying context, the State bears the burden of proving the conduct meets the legal definition of cyberbullying. Bullies are also subject to the “whims of a public prosecutor’s analysis of the claim, which many times results in charges never being brought.”⁹² Local police often will not get involved in such investigations unless they believe, based on their own perspective, that there is a true, criminally punishable threat or a means to carry out the threat.⁹³ Additionally, due to the reluctance of trial courts, students convicted of Internet harassment rarely receive the applicable penalty.⁹⁴ Therefore, although the Louisiana criminal statute may reach severe cases of cyberbullying, it is unlikely to reach the less extreme but still detrimental cases.

Lastly, one must analyze the effectiveness of the criminal statute from the student bully’s perspective. Pursuant to the criminal statute, the Children’s Code exclusively governs any situation falling under the statute that involves an individual under the age of 17.⁹⁵ This legal remedy may control the problem; however, three main problems arise. First, the remedy of criminal prosecution removes the bully from the school environment and places him in the criminal justice system. Thus, not only does this option lead to separation of the individual bully from the problem, but it also impacts his future because it automatically places him within the criminal system. Although criminal placement may be appropriate for extreme cases, it is debatable whether it is

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Erb, *supra* note 52, at 276.

93. Calvert, *supra* note 51, at 243.

94. Erb, *supra* note 52, at 275.

95. See LA. REV. STAT. § 14:40.7(D)(1)–(2) (Supp. 2012); LA CHILD. CODE art. 730(11).

appropriate for lesser yet still punishable cases. This assertion assumes that the state will even bring such charges and that the charges meet the legal definition of cyberbullying, thus making the bully susceptible to criminal punishment.

Second, although the juvenile justice system offers various rehabilitative mechanisms,⁹⁶ the bully is still separated from the other parties most impacted by his actions—the student victim and the school community.

As the Louisiana Supreme Court noted:

The Juvenile justice system dates back to the early 1900s and was founded as a way to both nurture and rehabilitate youths. [O]rdinary retributive punishment for the adolescent [was] inappropriate, in part, because [j]uvenile court philosophy made no distinction between criminal and non-criminal behavior, as long as the behavior was considered deviant or inappropriate to the age of the juvenile. As one commentator notes, [t]he hallmark of the [juvenile] system was its disposition, individually tailored to address the needs and abilities of the juvenile in question. The Louisiana juvenile system was founded upon this philosophy Thus the unique nature of the juvenile system is manifested in its noncriminal, or civil nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody.⁹⁷

Research suggests that conflict resolution approaches are most successful when the bully, the victim, and the school community work together through communication techniques and mutual understanding.⁹⁸ Thus, the criminal remedy undermines the initial attempt at a restorative justice approach. Third, like the civil remedy, this legal remedy is reactive as opposed to proactive. The legislation is designed to address an incident after it occurs. Although the very presence of such a criminal statute may theoretically deter related criminal behavior, that effect is only possible if students are aware of the criminal statute and its implications. Therefore, although the criminal statute does provide an avenue for addressing severe cases of cyberbullying, its reactive-based application is not likely to yield a permanent change or solution to the cyberbullying problem.

96. State *ex rel.* D.J., 817 So.2d 26, 29 (La. 2002).

97. *Id.*

98. Christensen, *supra* note 18 (one such example offered by the author is the Social Inclusion Approach).

C. The School's Authority Option

Both the civil remedy and the criminal offense possibility are questionable; however, the option of expanding the school districts' authority over students' off-campus Internet speech appears more promising.

1. Louisiana's Current Legislation

Louisiana Revised Statutes section 17:416.13 addresses school prohibitions against student conduct such as harassment, intimidation, and bullying.⁹⁹ In July 2010, the Louisiana Legislature amended this statute to include incidents of

99. LA. REV. STAT. § 17:416.13 (Supp. 2012).

Student code of conduct; requirement; harassment, intimidation, and bullying; prohibition; exemptions.

A. By not later than August 1, 1999, each city, parish, and other local public school board shall adopt a student code of conduct for the students in its school system. Such code of conduct shall be in compliance with all existing rules, regulations, and policies of the board and of the State Board of Elementary and Secondary Education and all state laws relative to student discipline and shall include any necessary disciplinary action to be taken against any student who violates the code of conduct.

B. (1) By not later than August 1, 2001, each city, parish, and other local public school board shall adopt and incorporate into the student code of conduct as provided in this Section a policy prohibiting the harassment, intimidation, and bullying of a student by another student.

(2) For purposes of this Subsection, the terms "harassment", "intimidation", and "bullying" shall mean any intentional gesture or written, verbal, or physical act that:

(a) A reasonable person under the circumstances should know will have the effect of harming a student or damaging his property or placing a student in reasonable fear of harm to his life or person or damage to his property; and

(b) Is so severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.

(3) Any student, school employee, or school volunteer who in good faith reports an incident of harassment, intimidation, or bullying to the appropriate school official in accordance with the procedures established by local board policy shall be immune from a right of action for damages arising from any failure to remedy the reported incident.

(4) The provisions of this Subsection shall not apply to the parishes of Livingston, East Baton Rouge, East Feliciana, West Feliciana, St. Helena, and Tangipahoa.

cyberbullying.¹⁰⁰ Mandated by House Bill 1458, the governing authority of each public elementary and secondary school shall conduct a review of the school's student code of conduct and ensure that the policy specifically addresses the "nature, extent, causes, and consequences of cyberbullying."¹⁰¹ The legislation defines cyberbullying as:

[H]arassment, intimidation, or bullying of a student on school property by another student using a computer, mobile phone, or other interactive or digital technology or harassment, intimidation, or bullying of a student while off school property by another student using any such means when the action or actions are intended to have an effect on the student when the student is on school property.¹⁰²

The legislation requires that after adopting such policy, the governing authority of each school must provide students, within ten days of enrollment, a written version of the policy.¹⁰³ This written version must include the nature and consequences of the prohibited actions as well as the proper process and procedure for handling incidents of cyberbullying.¹⁰⁴ The legislation additionally imposes a duty on each local school board to adopt a policy that establishes procedures for the local schools to follow when investigating reports of cyberbullying.¹⁰⁵ The State Department of Education must provide to the schools a behavior incidence checklist for each school to document the details of each cyberbullying report.¹⁰⁶ Lastly, the school must report all documented incidents of cyberbullying to the Department of Education in accordance with the Louisiana Administrative Procedure Act.¹⁰⁷ State Representative John LaBruzzo, sponsor of the bill, stated that the bill applies to and should properly address cyberbullying incidents that occur both on and off school property.¹⁰⁸

Although the current Louisiana legislation appears to provide a means by which schools can address both on-campus and off-

100. See *id.*; LA. DEP'T OF EDUC., *Legislative Bulletin: A Publication of the Office of Governmental Affairs*, June 25, 2010, <http://www.doe.state.la.us/lde/legis/legisupdate.html> (last visited October 17, 2010).

101. LA. REV. STAT. § 17:416.13 (Supp. 2012).

102. *Id.*

103. *Id.*

104. *Id.*

105. LA. DEP'T OF EDUC., *supra* note 100.

106. LA. REV. STAT. § 17:416.13 (Supp. 2012).

107. *Id.*

108. LA. DEP'T OF EDUC., *supra* note 100.

campus cyberbullying, schools need more state action and support in order to adequately deal with the increasing prevalence of cyberbullying. The remainder of this Comment is a call to action for the Louisiana Legislature, schools, students, parents, and the community at large. First, society must refocus its perspective on the traditional view of the school as a mediating institution. Next, the schools must develop a holistic approach by creating an anti-bullying climate within the school and across the state. Then, in order to develop and foster this new perspective and school climate, state legislatures must refocus and revise the current legislation. Once such actions are taken, schools can properly address students' off-campus cyberbullying as well as other off-campus student activity.

2. *The Traditional Mediating Function of the School*

Historically, the American legal system recognized the school as being “*in loco parentis*,” or in the “place of the parent,” and as being a natural extension of the parents.¹⁰⁹ Through this perspective, parental authority is delegated from the parents to the public schools.¹¹⁰ As a result, the American public school system has been traditionally understood as a mediating institution and an extension of parental interests and family life.¹¹¹ However, historical events—such as the Vietnam War, and actions of the federal government, such as the United States Supreme Court’s decision in *Brown v. Board of Education*—fostered a new societal view of the public school as simply another bureaucratic agency.¹¹² Public perception of the school as a mediating institution shifted to a societal view of the school as an instrument of social control.¹¹³ Federal legislation such as *No Child Left Behind* has further allowed the federal government to take away state and local control over the public school system.¹¹⁴

109. Erb, *supra* note 52, at 280.

110. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Institutions*, 48 OHIO ST. L.J. 663, 670–71 (1987).

111. *Id.* (finding that this natural link between families and the public school system was “reinforced by the tradition of local control and financing of public education, which relies heavily on locally elected school boards and local property tax revenues” and that “schools are extensions, and ultimately the responsibility of both local communities and the homes that comprise them”).

112. *Id.*

113. *Id.*

114. *Id.*

3. The Push to Refocus Perspective

In light of this negative societal perception, the proper starting point in addressing the issue of cyberbullying is to refocus society's perspective on the traditional mediating function of the school. This traditional school function includes both the child-nurturing and custodial functions commonly associated with the parental role. Because of its dual functions, the school stands in a unique position as both a governmental entity and parent-like force. Due to this unique position, it is the school that can best address the issue of cyberbullying by providing an avenue for implementation of anti-bullying legislation while still providing its custodial and child-nurturing functions. Hence, it is the school and not the courts that can best provide a neutral place and means to address off-campus cyberbullying. Once society refocuses its perception of the school, the school can regain its traditional mediating role and properly address students' off-campus cyberbullying. As a result, the questions become whether a school district can legally control the students' off-campus Internet speech, and if given this authority, through what means the school can properly address the problem.

a. Can a School District Legally Control a Student's Off-Campus Internet Speech?

i. A Lesson in Geography and Constitutional History

The first hurdle to a school district's authority over off-campus cyberbullying is the location of the student's actions. The geography of cyberbullying is typically classified as (1) on-campus cyberbullying, (2) on-campus use of personal technology that does not access the school's network, or (3) off-campus cyberbullying. In *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court held that as long as a school's action is "reasonably related to legitimate pedagogical concerns," it can refuse to provide its resources for student expression with which it disagrees.¹¹⁵ Thus, the school district's control over on-campus Internet speech does not appear to be an issue because of the school's strong concern over preventing cyberbullying.

Because of the public outcry over violent school incidents, most schools permit students to possess their personal electronic

115. 484 U.S. 260, 273 (1988).

devices on the school grounds, subject to school regulation.¹¹⁶ These personal electronic devices include various types of cell phones with access to cameras, text messaging, and social networking sites.¹¹⁷ The school's authority to control student use of such devices is more difficult to determine and define. Initial research indicates that students are reluctant to tell school authorities about bullying because they may have to disclose their own violation of school policy regarding use of electronic devices.¹¹⁸ Additionally, school authorities have encountered state wiretapping laws and Fourth Amendment concerns regarding students' rights to protection from unreasonable searches and seizures.¹¹⁹ Because of the personal element of the technology, the school must constantly question the reasonableness of its prevention and disciplinary actions.¹²⁰

Although school officials may encounter difficulties in addressing on-campus student Internet speech that involves the student's personal electronic device, a school's authority over the student's off-campus Internet speech is even more controversial. The main limitation faced by the school is the student's First Amendment right to freedom of speech. *Tinker v. Des Moines Independent Community School District* is the fountainhead case for any legal analysis of a student's freedom of speech.¹²¹ In *Tinker*, the Supreme Court stated:

A student's rights do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without *materially and substantially interfering* with the requirements of

116. For current Louisiana legislation in regard to student possession of personal electronic devices on school grounds, see LA REV. STAT. § 17:239 (2010). See also Office of the Attorney General of the State of Louisiana, Opinion No. 03-0351, 2003 La. AG LEXIS 485 (finding that since Louisiana Revised Statutes section 17:239 does not prohibit or allow the possession by students of cellular telephones while students are in school, on school grounds, and in school buses, a local public school board can adopt a code of conduct that includes regulations and any necessary disciplinary action concerning the possession by students of cellular telephones, provided the regulations are in compliance with all existing rules, regulations, and policies of the local school board and of the State Board of Elementary and Secondary Education and all state laws relative to student discipline).

117. See LA REV. STAT. § 17:239 (providing examples of devices).

118. HERTZ & DAVID-FERNDON, *supra* note 4, at 10.

119. Barnett, *supra* note 25, at 587.

120. *Id.*

121. 393 U.S. 503 (1969).

appropriate discipline in the operation of the school *and without colliding with the rights of others*.¹²²

The Court emphasized that protection of constitutional freedoms was especially important within the American classroom where the “marketplace of ideas” should prosper.¹²³ In *Tinker*, the Court concluded that a school could suppress a student’s speech only if it reasonably forecasted that the speech would create a “material interference or substantial disruption of the educational environment.”¹²⁴ Justice Fortas broadened the school’s authority when he stated that the “invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech.”¹²⁵

ii. Tinker and Technology

The United States Supreme Court has yet to rule on a bullying case or on the extent of a school district’s control over students’ off-campus cyberbullying.¹²⁶ For that reason, lower courts have used *Tinker* and its progeny—*Fraser*,¹²⁷ *Hazelwood*,¹²⁸ and recently *Morse*¹²⁹—to analyze both students’ on-campus and off-campus Internet speech.¹³⁰ These courts have adopted a somewhat altered *Tinker* test, classifying certain, technically off-campus incidents as “on campus” where there is a “sufficient nexus between the web site and the school campus.”¹³¹ Thus, the school is able to gain jurisdiction under a strict *Tinker* analysis because the activity is classified as “on campus.”

122. *Id.* at 512–13 (emphasis added).

123. *Id.*

124. Turbert, *supra* note 10, at 664.

125. *Id.*

126. *Id.*

127. *Bethel Sch. Dist. No. 403 v. Frazer*, 478 U.S. 675 (1986).

128. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

129. *Morse v. Frederick*, 551 U.S. 393 (2007).

130. *Id.* For examples of the United States Supreme Court permitting school administrators to punish student speech in certain circumstances, see, e.g., *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (concluding that schools may protect students from “speech that can reasonably be regarded as encouraging illegal drug use”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (concluding that a principal did not violate the First Amendment when he deleted pages of an article from a school’s journalism course as opposed to rewording or modifying the material); *Bethel Sch. Dist. No. 403 v. Frazer*, 478 U.S. 675, 678–85 (1986) (permitting a school administrator to suspend a student who gave a “lewd and indecent” speech at a school assembly, reasoning that such a speech undermines the school’s basic educational mission).

131. Erb, *supra* note 52, at 264.

Yet, even where the off-campus cyberbullying was clearly targeted toward impacting the student body, the majority of courts fail to find a sufficient nexus to classify such activity as “on campus.”¹³² Furthermore, even where a sufficient nexus is established, the school still must prove that the bully’s actions caused a material or substantial interference at the school.¹³³ Courts have stated that although “complete chaos is not required,” a mild distraction or disturbance will not be sufficient to meet the test.¹³⁴ Examples of sufficient disturbances include classes being canceled and teachers taking leave because of the cyberbullying incident.¹³⁵ Additionally, in determining the impact, courts conduct an overall analysis of the chaos caused by the speech.¹³⁶ With the standard set this high, few schools, even if capable of establishing a sufficient nexus to classify the student’s activity as “on campus,” will be able to meet the “substantial and material interference test.”

iii. Handling the Legal Limitations: Place of Impact and True Threats

The courts and state legislature can attempt to address this First Amendment limitation through two primary methods. First, the courts could predominantly focus their analysis on the practical place of impact as opposed to the place of origin. Some scholars argue that schools should not have authority to control a student’s cyber-speech or cyber-action when it occurs off campus and after school hours.¹³⁷ To support their argument that off-campus speech is simply not within the school’s jurisdiction, scholars make the comparison between the judge and the school principal in dealing with out-of-court and off-campus speech incidents.¹³⁸ For example, just as a judge cannot place an individual in contempt of court for

132. See, e.g., *Emmett v. Kent School Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000), in which the court considered the appropriateness of a student suspension in regard to his creating a website from his personal home computer without using any school resources. The court held that “although the intended audience was undoubtedly connected to [the school], the speech was entirely outside of the school’s supervision or control.” *Id.* at 1090.

133. Erb, *supra* note 52, at 266.

134. See, e.g., *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (“The record indicates only a showing of mild curiosity on the part of other school children . . . [which] did not hamper the school in carrying on its regular schedule of activities . . .”).

135. Erb, *supra* note 52, at 266.

136. *Id.*

137. Calvert, *supra* note 51.

138. Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 143–44 (2003).

statements made outside his courtroom, a school administrator has no authority to punish off-campus student speech.¹³⁹ Thus, their main argument is focused on where the student's action originated. However, other scholars argue that school authority over off-campus cyberbullying is a question of impact and not geography.¹⁴⁰ These scholars acknowledge that although the cyberbullying may take place off-campus and not during school hours, most victims feel the result during the hours they attend school and are surrounded by their classmates and, most likely, the bully.¹⁴¹ These scholars also emphasize the impact of the bully's actions on not only the student victim but also the entire school community.¹⁴² The impact-effect test properly determines school authority over off-campus cyberbullying: when the impact of cyberbullying substantially interferes with victims' abilities to pursue their educational needs and benefits, a school's authority encompasses the off-campus cyberbullying. By framing the analysis in such a manner, one can better address the on-campus versus off-campus nexus requirement. If the court focuses its analysis on the impact of the student's actions, then more activity will be classified as "on campus," and the school district will be in a better position to assert jurisdiction.

Legislatures could also define cyberbullying in such a manner that if off-campus activity complies with the definition, it will automatically be classified as a "true threat." Since "true threats" are not protected under the Constitution, the recognition of a "true threat" allows the school to punish purely off-campus speech without fear of violating the student's First Amendment rights.¹⁴³ Most courts define a "true threat" as a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group"¹⁴⁴ In a true threat analysis, the court must determine whether the speech was "intentionally or knowingly communicated to the victim" and analyze the "full context of the statement,

139. *Id.*

140. Servance, *supra* note 13, at 1239 (suggesting a three-part test: (1) replace the on-campus or off-campus threshold test with an "impact analysis" test that would evaluate whether "both the target and the speaker are members of the same school community," (2) require the school to determine "whether the speech would cause the negative side-effects of traditional bullying," and (3) require the school to show that the impact of the speech "disrupts [its] ability to educate students or maintain sufficient . . . control over the classroom.").

141. *Id.*

142. *Id.*

143. Turbert, *supra* note 10, at 671.

144. *Id.* at 670-71.

including all relevant factors that might affect how the statement could reasonably be interpreted,” such as a “serious expression of an intent to intimidate or inflict bodily harm.”¹⁴⁵ Based on the definition used in this comment,¹⁴⁶ student action constituting the four elements of cyberbullying is unlikely to fall within the unprotected “true threat” realm of student speech.¹⁴⁷ However, within the school environment, the “true threat” analysis should include lesser student speech than what courts would normally classify as “true threats” and thus render such student speech outside the scope of First Amendment protection.

Although the “marketplace of ideas” includes divergent social and political viewpoints, this “market” should never include bullying, harassment, and threatening speech.¹⁴⁸ Thus, as Justice Black explained, the Federal Constitution does not compel “teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”¹⁴⁹ In his 2007 partial concurrence in *Morse*, Justice Breyer offered some guidance in regard to how the Court may handle a school district’s control over off-campus student Internet speech.¹⁵⁰ Justice Breyer thought it unwise to even address the issue of the First Amendment within the school setting because of the school’s unique responsibility in handling the students’ education and discipline.¹⁵¹ He asserted, “Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence.”¹⁵² Justice Breyer also suggested that the judiciary should defer to the school district’s judgment and that school districts need more-encompassing authority when encountering and handling such unique school circumstances.¹⁵³ Thus, although the Court has yet to rule on this particular issue, one could argue that based on the Court’s chipping away of the *Tinker* standard¹⁵⁴ and its emphasis

145. Erb, *supra* note 52, at 267.

146. See *supra* Part II.B

147. Turbert, *supra* note 10, at 671 (finding that although cyberbullying and Internet-based speech “involve extreme derogatory comments directed toward a victimized student, these remarks usually will not be considered true threats”).

148. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

149. *Id.* at 526 (Black, J., dissenting).

150. *Morse v. Frederick*, 551 U.S. 393, 425–33 (2007) (Breyer, J., concurring and dissenting in part).

151. Turbert, *supra* note 10, at 669.

152. *Morse*, 551 U.S. at 427.

153. Turbert, *supra* note 10, at 669–70.

154. See generally, *supra* note 130.

on preserving the uniqueness of the school environment,¹⁵⁵ the Court may recognize a school district's jurisdiction over a student's off-campus Internet speech that normally would not be classified as a "true threat" or as a "material and substantial disturbance." Therefore, until the United States Supreme Court provides the states with a standard for determining a school district's authority over off-campus student Internet speech, state legislation must be carefully written and interpreted to pass the uncertain constitutional test.

b. Passing the Uncertain Constitutional Test: Through What Means Can a School District Control a Student's Off-Campus Internet Speech?

Although state legislative action is a necessary component for addressing cyberbullying, local school boards and schools must develop and foster the best policy for each particular school community. Therefore, the goal of the state legislation needs to be local control through state action.

i. The School's Role: Climate Control

Schools must be cognizant of their imperative role in the process of addressing cyberbullying. The state and the schools must develop a collaborative approach not only to handling a cyberbullying issue once it occurs but also to developing a statewide culture against student bullying. Therefore, the individual schools must redefine their own approaches to the bullying issue. Each school must develop a whole-school approach by creating an anti-bullying culture or climate within the school. Such a group climate is defined as "the general collective description of the organization that shapes members' expectations and feelings and therefore the organization's performance."¹⁵⁶ Researchers find that a positive school climate leads to better student attendance, improvement in student behavior, increases in scholastic achievement, and even an increase in the school

155. See *Morse*, 551 U.S. 393 (2007) (recognizing that a school environment possesses special characteristics in which the school is responsible for the safety and development of the children and that Principal Morse's actions and her belief that the banner at issue supported illegal drug uses in violation of the school's anti-drug policy were reasonable, and as a result, the Court may recognize the broad jurisdiction of a school district that has an anti-bullying or anti-cyberbullying policy and prevention system in place).

156. STEPHEN W. LITTLEJOHN & KAREN A. FOSS, *THEORIES OF HUMAN COMMUNICATION* 263 (9th ed. 2008).

community's belief in overall school safety.¹⁵⁷ Additionally, a positive school climate that emphasizes acceptable student behavior leads to a decrease in detrimental student behavior such as bullying.¹⁵⁸ Essentially, a positive school climate that firmly establishes the boundaries of accepted and desired student behavior determines the quality of life for not only the student but also the entire school community.¹⁵⁹ As one scholar asserted, "Only in a school environment where teasing and bullying are out of place can we truly get a handle on this subversive and difficult community problem."¹⁶⁰

ii. The State's Role: Implementation and Incentives

Although school action is essential, state legislative participation is necessary to complete a whole-school approach.¹⁶¹ The state school system as a whole needs a standard policy that is based on a proactive, holistic approach as opposed to the current reactive, incident-focused approach. For example, the current legislation mandates that a school adopt a policy for handling incidents of cyberbullying after-the-fact.¹⁶² Inevitably, the schools' policies focus on reaction to an incident of cyberbullying by emphasizing where and how to report the problem. As a result, disciplinary action only takes place after the incident occurs and is properly reported. In order to develop a proactive response to cyberbullying, the state legislature must first develop a proactive state policy to present a collaborative approach to the issue.¹⁶³ This collaborative effort will better enable the development of an anti-

157. See generally N. M. Haynes, C. Emmons, & M. Ben-Avie, *School Climate as a Factor in Student Adjustment and Achievement*, 8 J. EDUC. & PSYCHOL. CONSULTATION 321, 321-329 (1997); S. HINDUJA & J.W. PATCHIN, *BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING* (2009); D. Stover, *Climate and Culture: Why Your Board Should Pay Attention to the Attitudes of Students and Staff*, 192 AM. SCH. BOARD J. 12, 30-33 (2005); Welsh, *supra* note 14.

158. See generally Welsh, *supra* note 14.

159. *Id.*

160. Christensen, *supra* note 18, at 578.

161. *Id.* at 555 (finding that despite the good intentions with which state legislatures enact anti-bullying legislation, "they have been largely ineffective in reducing incidents of bullying because they focus on specific incidents rather than forcing schools to adopt a whole-school approach to bullying").

162. LA REV. STAT. § 17:416.13 (2010).

163. Christensen, *supra* note 18, at 555.

bullying climate not only within the individual schools but also throughout the entire state.¹⁶⁴

Studies suggest that, when the school and community take a collaborative approach to the issue, policies are not only adopted but also implemented and enforced.¹⁶⁵ Without extensive involvement of the whole school community, policies are likely to be enforced only in egregious situations.¹⁶⁶ As a consequence of these tendencies, effective statewide legislation is an essential starting point to developing an effective approach to the problem. Research indicates that the very presence of a proactive approach to cyberbullying can foster a school culture where true change is possible.¹⁶⁷ Therefore, the Louisiana Legislature needs to amend the current cyberbullying legislation to ensure that school districts will have authority over students' off-campus Internet and other electronic speech and to encourage not only adoption but also implementation of the legislation through school incentives and the establishment of local and state boards.

As previously mentioned, the school district's jurisdictional control over students' off-campus Internet speech is questionable. However, as noted above, the wording of the legislation can ensure school control of some off-campus speech. Because the United States Supreme Court has yet to define the standard of control, the level of constitutionally permissible school authority is not certain. Currently, the Louisiana legislation limits cyberbullying to acts "of a student *while off school property* by another student . . . when the action or actions are *intended to have an effect* on the student when the student is *on school property*."¹⁶⁸ Thus, the current standard for a Louisiana school district's jurisdiction is an impact-effect analysis. The school has authority to regulate the off-campus speech if it was intended to have an effect on a student on school property.

This "effect" standard may seem easy for school authority figures to meet so as to justify their disciplinary action. The problem is that this standard probably does not meet the constitutional requirements. In nearly all student on-campus and off-campus speech cases, the courts emphasized the impact of the

164. *Id.* at 555–56 (finding that "statutory attempts to address bullying directly fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures").

165. *Id.* at 557–58.

166. *Id.* at 557.

167. *Id.* at 562.

168. LA REV. STAT. § 17:416.13 (2010) (emphasis added).

student's speech upon the educational climate.¹⁶⁹ Although the student's right to free speech does not stop at the school gates,¹⁷⁰ the educational climate itself does impact the analysis. As Justice Breyer suggested in *Morse*, the educational climate provides unique circumstances that are best understood and handled by school authority.¹⁷¹ In addition, one must remember the unique position of the school and its traditional role as a mediating function. In light of these factors, this Comment proposes that, in order to better ensure compliance with constitutional standards, the school district must base its control on the educational benefits for the students. Thus, an evaluation of the bullying's impact on the student victim's educational well-being is an essential component in determining the school district's authority.

In order to better ensure compliance with constitutional standards, the state legislature must clearly explain its purpose in enacting cyberbullying legislation. The Arkansas Legislature stated that its main reason for permitting such school authority was the Internet's ability to "affect the educational environment by quickly reaching a large number of students and employees, creating an environment of fear and intimidation that materially or substantially disrupts class work and discipline in a public school."¹⁷² Thus, the Louisiana Legislature needs to firmly articulate a legitimate purpose for enacting the cyberbullying legislation and for granting school districts authority over cyberbullying incidents. If the Louisiana Legislature establishes a legitimate state concern, the legislation is more likely to survive any constitutional challenge. Additionally, the definition of cyberbullying must be narrow, lucid, and precise. There are several approaches to better ensure constitutional compliance through properly defining cyberbullying.¹⁷³ One option is to bifurcate the standard.¹⁷⁴ The legislation should distinguish the standard for on-campus and off-campus student Internet speech.¹⁷⁵ The legislation should use language from First Amendment case law to ensure that the on-campus school authority meets the somewhat altered *Tinker*

169. See generally *supra* note 155.

170. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

171. *Morse v. Frederick*, 551 U.S. 393, 425–33 (2007) (Breyer, J., concurring and dissenting in part).

172. Leah Ward, *Suspended on Saturday? The Constitutionality of the Cyberbullying Act of 2007*, 62 ARK. L. REV. 783, 786–87 (2009); see also ARK. CODE ANN. § 6-18-514 (2009).

173. Cf. Barnett, *supra* note 25, at 618.

174. *Id.*

175. *Id.*

“material and substantial disturbance test.” In regard to off-campus student Internet speech, the legislation should move away from the *Tinker* standard and instead use a hostile-environment test. For example, one scholar proposed the following language for granting a school district control over student’s off-campus Internet speech:

A student may be disciplined under this section for any act of cyberbullying, including any act that occurs outside of school and after school hours, if that act creates a *hostile educational environment* for one or more students. A hostile educational environment is created when:

- 1) the act is severe, persistent, or pervasive, and
- 2) the act substantially interferes with a student’s ability to participate in or benefit from the services, activities, or privileges provided by the school.¹⁷⁶

Louisiana’s current definition of cyberbullying grants a school district control over off-campus cyberbullying if the off-campus activity was intended to have an effect on the student while on school property. Although this standard *might* pass a constitutional test, the legislature should narrow the scope of the definition by providing a more concise definition of cyberbullying based on the hostile environment definition provided above. In addition, the legislature should provide factual examples in its statutory notes or legislative history of student off-campus speech that would yield to school districts’ authority.¹⁷⁷ Such state action could better equip the legislation to pass any possible constitutional challenges.

In addition to a more precise and limited definition of cyberbullying, the legislature must provide clear standards for punishing student speech. The legislation must seek implementation as opposed to adoption. Educational studies indicate that most state anti-bullying legislation is based on the mistaken premise that forms of bullying are easily discoverable and that a simple list of consequences will solve the problem.¹⁷⁸ However, the empirical research does not support such a premise. Bullying is described as an “underground phenomenon” and is normally difficult to detect.¹⁷⁹ One can reason that, in a world where many educators are generations away from their students in terms of understanding and knowledge of technology, cyberbullying is even more difficult to detect. Thus, training and education are necessary for understanding not only the underlying

176. *Id.* (emphasis added).

177. *Id.*

178. Christensen, *supra* note 18, at 558; *see also* Weddle, *supra* note 23.

179. Christensen, *supra* note 18, at 558.

bullying issue itself but also the technology-based medium of cyberbullying. Although a school may easily adopt an anti-cyberbullying policy, effective implementation of that policy will require additional understanding, education, and training of school administrators, parents, and students. A school cannot simply inform the school community about the cyberbullying policy. Instead, education, training, and school action are essential components in creating the anti-cyberbullying climate necessary for the success of the legislation. Therefore, the goal of the new legislation should be to provide the school with encompassing authority to deal with the issue of cyberbullying and to provide incentives for implementation.

Legislatures and schools need to be aware that implementation of cyberbullying policies will take a considerable amount of time.¹⁸⁰ Because the various school policies currently only require adoption, school officials have no legislative incentive to bring cyberbullying actions to the attention of the school community. Additionally, few school officials desire negative publicity for their schools, especially for bullying behavior among the students.¹⁸¹ So the new legislation must offer the schools incentives for implementation.¹⁸² The legislation must provide that if the school fails to meet its duty of care, both the student victim and bully will have a cause of action against the school.¹⁸³ This cause of action should create an incentive for proper school implementation.¹⁸⁴ Moreover, when a school complies with the legislative adoption and implementation requirements, the legislation should provide a rebuttable presumption that the school met its duty in regard to the care of the child.¹⁸⁵ Therefore, the student must meet the standard burden of proof and must additionally overcome the presumption that the school met its duty of care.¹⁸⁶

Another suggested statutory incentive to encourage school implementation is to make certain state funds conditional on proper implementation.¹⁸⁷ The state legislature could also provide additional funding for a school's technology programs and information technology departments if the school shows proper adoption, implementation, and a certain amount of success of the

180. Cf. Limber, *supra* note 72.

181. Cf. Christensen, *supra* note 18, at 574.

182. Cf. Barnett, *supra* note 25, at 618.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

policy. Although anti-bullying programs are time consuming, the cost of implementation is usually fairly reasonable.¹⁸⁸ Thus, the school will most likely be able to use any additional funding for academic purposes as opposed to having to direct the funds at implementing the policies.

Although the state legislature should defer to school districts in regard to the tailoring of their own anti-cyberbullying policies, the state legislature could provide certain guidelines and examples of successful, low-cost programs from other states. For example, the state legislature should require that certain elements be present within a school policy in order for the school to receive any additional funding. Such elements may include the following: a definition of expected student behavior in regard to cyberbullying, examples of both consequential and remedial discipline, and a school plan detailing its planned response to a bullying incident. Additionally, the state legislature could provide via the state website examples of successful programs being implemented across the country.

The Olweus Bullying Prevention Program provides one such example of a bullying prevention option for a school.¹⁸⁹ Although the program was predominantly designed for traditional forms of bullying, local school officials could use the program as a guide for developing their cyberbullying policy.¹⁹⁰ The program, which was designed to address the dropout crisis, focuses first on educating the school community about bullying.¹⁹¹ This initial educational aspect is essential in the more unknown world of cyberbullying. This prevention guide emphasizes the five main components of program success: schools, classrooms, parents, individuals, and communities.¹⁹² The goals of the program are to reduce existing bullying problems, prevent the development of new bullying problems, and achieve better peer relations at school.¹⁹³ Such goals could provide a good starting point for local school development and implementation. Lastly, the Olweus Bullying Prevention Program establishes the importance of a community-level component.¹⁹⁴ The program suggests the involvement of community members by developing school partnerships with community members to support and perhaps even help fund the school program as well as the overall goal of helping to spread the

188. Cf. Limber, *supra* note 72.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

anti-bullying message and principle throughout the local community.¹⁹⁵

Finally, it is essential that the legislation provide a degree of statewide control and judicial review over the school programs. Although still maintaining local autonomy, statewide guidelines should require each school board district to form a committee or board to review any school disciplinary action regarding a student's off-campus cyberbullying. A necessary component of these boards is knowledge and awareness of the problem. Thus, an ideal board may consist of members with educational, counseling, psychology, and social work backgrounds.

In addition to creating boards, and as previously mentioned, the legislation should provide an affected student with a cause of action against the school. Both the student victim and the bullying student should be able to bring an action against the school for improper implementation of the school policy or for improper school disciplinary action. Such a cause of action will provide a judicial review avenue for a student displeased with a board decision. Like a board, a state district court can evaluate the cyberbullying situation by using the standard found in the legislation, incorporating the facts found by the board, and focusing on the overall goal or policy of the legislation. Hence, the court could balance the rights of the students and the special need to maintain an effective and safe learning environment. Since the students must first go through the school and the school board before going to court, the legislation is unlikely to be burdensome to the court system and is likely to encourage local implementation and control of the issue.

III. CONCLUSION

*If you think that making fun of someone is harmless—you're wrong. If you think it's ok to do because everybody else is doing it—you're wrong. Bullying has to stop. And it has to start with you.*¹⁹⁶

In the cyberbullying world, a victim cannot simply avoid the playground or scratch off the dirty comments from the bathroom wall. As this Comment illustrates, cyberbullying is borderless, and the bully has the ability and power to reach his victim essentially anytime and anywhere. Bullying incidents continually evoke

195. *Id.*

196. Drew Brees, *Drew Brees Speaks Out About Bullying*, YOUTUBE, http://www.youtube.com/watch?v=3u_vtO7zgsA (last visited Mar. 8, 2012).

national attention.¹⁹⁷ Thus, this “technological upgrade to name calling” is rapidly becoming a disconcerting social issue. Given the newness and uncertainty of the cyberworld, proper control and regulation of the problem are only an educated estimation. However, by developing and implementing a proactive and holistic approach to combating the issue of cyberbullying in school districts around the State, Louisiana can place itself in a position not only to handle incidents of cyberbullying but also to develop a collaborative anti-bullying climate. Through state action, the Louisiana Legislature has the potential to restructure the school as the traditional mediating forum and allow the school to serve its traditional function of developing the adolescent’s personal uniqueness and appropriate civic responsibility. Through this holistic approach, the State of Louisiana will be in a better position to understand, address, and hopefully solve the cyberbullying epidemic.

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197. See generally Thomas J. Sheeran, *Ohio District Where 4 Died Says it Fights Bullying*, THE BOSTON GLOBE, Oct. 11, 2010, available at http://www.boston.com/news/education/k_12/articles/2010/10/11/ohio_district_where_4_died_says_it_fights_bullying/; Sebastian Smith, *Gay Student in Alleged Webcam Bullying Commits Suicide*, AGENCE FRANCE-PRESSE, Oct. 1, 2010, available at <http://newsinfo.inquirer.net/breakingnews/infotech/view/20101001-295328/Gay-student-in-alleged-webcam-bullying-commits-suicide>.

* J.D./D.C.L., 2012, Paul M. Hebert Law Center, Louisiana State University. The author thanks Professor Ken Levy for his knowledge and guidance while writing this Comment. I am also grateful to my parents for their love and support during this process.